

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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Case No. 2:23-cv-00344-CDS-EJY

ORDER

D.M.P., a minor child by and through his legal guardian, ANNIE POMPA MOREJON;
C.V.P. a minor child by and through his legal guardian, RUBY PEREZ CHINO; C.R.C., a minor child by and through his legal guardian, AMERICA CARDONA; J.P., a minor child by and through his legal guardian, JESENIA PLASCENCIA; D.P. a minor child by and through his legal guardian, MARGARET PETNEAUD,

Plaintiffs,

v.

BEECH-NUT NUTRITION COMPANY,
INC.; GERBER PRODUCTS COMPANY;
PLUM PBC, d.b.a. PLUM ORGANICS;
SPROUT FOODS, INC.; and WALMART,
INC.,

Defendants.

Pending before the Court is Defendants' Joint Motion to Sever (ECF No. 41). The Court reviewed the Motion, Plaintiffs' Opposition (ECF No. 52), and Defendants' Reply (ECF No. 59). Also pending is Plaintiffs' Motion to Amend (ECF No. 53), which the Court considered along with Defendants' Opposition (ECF No. 58), and Plaintiffs' Reply (ECF No. 60).

I. Discussion.

A. Defendants' Motion to Sever.

This case arises from a group of unrelated plaintiffs who filed a Complaint alleging they consumed various baby food products containing dangerous levels of toxic heavy metals knowingly sold by Defendants causing these plaintiffs to develop lifelong brain damage and other neurodevelopmental disorders. ECF No. 1 at 1-2. Defendants contend Plaintiffs' complaints should be severed into separate actions because Plaintiffs' claims do not arise from the same transaction or occurrence and do not present significant common questions of fact and law. ECF No. 41 at 8-14.

1 Defendants argue failure to sever will be prejudicial and cause inefficiencies while severance will
2 not be prejudicial to Plaintiffs. *Id.* at 14-15. Nonetheless, Defendants agree Plaintiffs' actions should
3 remain consolidated for purposes of common-issue discovery and dispositive motions practice. *Id.*
4 at 15.

5 Plaintiffs submit their claims arise from the same series of transactions or occurrences
6 because Defendants voluntarily interconnected their business transactions, jointly formed the Baby
7 Food Council to address toxic heavy metals in baby food, and voluntarily participated in a United
8 States House of Representatives investigation into dangerous levels of toxic heavy metals in baby
9 food. ECF No. 52 at 5-7, 10-15. Plaintiffs argue they raise common questions of law and fact (*id.*
10 at 15-18) and point to a similar case in which Defendants acted jointly. *Id.* at 7. Plaintiffs contend
11 severing their claims will prejudice them by increasing costs and causing delays, while also resulting
12 in judicial inefficiency. *Id.* at 19-24. Plaintiffs request additional time to conduct discovery to obtain
13 more evidence demonstrating Defendants' connections with one another. *Id.* at 24-25. Finally,
14 Plaintiffs argue the cases should be consolidated to promote judicial economy. *Id.* at 25.

15 Defendants respond arguing Plaintiffs' opposition to severance relies on allegations not
16 contained in the Complaint. ECF No. 59 at 2-3. Defendants argue each Plaintiffs' ingestion of
17 different baby food products is not part of the same series of transactions and occurrences. *Id.* at 3-
18 5. Defendants contend Plaintiffs do not identify common questions of law or fact and, without
19 severance, they will be prejudiced by having to participate in irrelevant discovery that will increase
20 costs. *Id.* at 6-9. Yet, Defendants again agree "the severed actions should be consolidated for
21 purposes of discovery to the extent possible." *Id.* at 8.

22 *1. The law applicable to severance.*

23 Unrelated plaintiffs may be joined in one action under Federal Rule of Civil Procedure
24 20(a)(1) if they "assert any right to relief jointly, severally, or in the alternative with respect to or
25 arising out of the same transaction, occurrence, or series of transactions or occurrences," and "any
26 questions of law or fact common to all plaintiffs will arise in the action." Similarly, unrelated
27 defendants may be joined in one action under Federal Rule of Civil Procedure 20(a)(2) if the "right
28 to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out

1 of the same transaction, occurrence, or series of transactions or occurrences,” and “any question of
 2 law or fact common to all defendants will arise in the action.” Rule 20(a)(3) also states: “[n]either
 3 a plaintiff nor a defendant need be interested in obtaining or defending against all the relief
 4 demanded.” A “court may grant judgment to one or more plaintiffs according to their rights, and
 5 against one or more defendants according to their liabilities.” *Id.* Both prongs of Rule 20(a)(1) and
 6 (2) must be satisfied for joinder to be proper. *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir.
 7 1997); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 917 (9th Cir.
 8 1977). Rule 20 is liberally construed “in order to promote trial convenience and to expedite the final
 9 determination of disputes, thereby preventing multiple lawsuits.” *League to Save Lake Tahoe*, 558
 10 F.2d at 917 (citing *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974)).

11 2. *The Motion to Sever is denied without prejudice.*

12 There is no doubt that the parties agree certain common-issue discovery and dispositive
 13 motion practice should be consolidated. ECF Nos. 41 at 15 (“the parties can and should coordinate
 14 on appropriate common-issue discovery and common-issues dispositive motions to avoid
 15 duplicative efforts”); 52 at 26 (“[i]f severance is granted, Plaintiffs urge the Court to exercise its
 16 discretion and consolidate these cases”); 59 at 8 (“the parties agree that the severed actions should
 17 be consolidated for purposes of discovery to the extent possible. ... Likewise, motions could be
 18 heard by the same judicial officer”). Further, all Plaintiffs sue Gerber Products Company (“Gerber”);
 19 four of the five Plaintiffs sue Walmart, Inc. (“Walmart”); three Plaintiffs sue Beech-Nut Nutrition
 20 Company, Inc. (“Beech-Nut”); two Plaintiffs sue Sprout Foods, Inc. (“Sprout”); and one Plaintiff
 21 sues Plum Organics (“Plum”). ECF No. 1 at 22-27. Plaintiffs and Defendants agree that joint
 22 interrogatories, document requests, requests for admissions, fact depositions, corporate
 23 representative depositions, and expert discovery would benefit from the consolidation of discovery
 24 to the extent claims overlap. So may inquiries related to the Baby Food Council and the
 25 congressional investigation. However, the exact nature and breadth of discovery is to be determined
 26 by the parties and, as needed, by the Court. In contrast, to the extent there are non-overlapping issues
 27 regarding particular Defendants, specific discovery related to those Defendants should not be
 28 consolidated.

Given agreement regarding appropriately joint discovery the parties must meet and confer to develop a proposed detailed discovery plan and scheduling order addressing discovery they agree is properly consolidated, discovery the parties agree must occur without the involvement of all Plaintiffs and Defendants, and the discovery on which agreement cannot be reached. The parties must also address joint dispositive motion practice to the extent feasible. After receiving the parties' positions, the Court will hold a hearing to discuss and set a discovery plan and scheduling order.

Because discovery will be consolidated to the extent possible, the Court declines to enter an order severing the cases at this time. For the same reason, the Court does not analyze the Federal Rule of Civil Procedure 20(a)(1) and (2) factors in this Order. The issue of severance may be revisited as it relates to trial or, as needed, to address dispositive motion practice.

B. Plaintiffs' Motion to Amend.¹

Plaintiffs' Motion to Amend, their first, seeks to add two new Plaintiffs and two new Defendants supported by allegations regarding all Defendants' interconnected activities.² ECF No. 53 at 3. Plaintiffs argue amendment promotes efficiency and maximizes resources. *Id.* at 7. Plaintiffs contend the case is in its earliest stages, they did not unduly delay in seeking amendment, and Defendants are not prejudiced by amendment. *Id.* at 7-9. Plaintiffs also argue amendment would not be futile because the claims asserted by the new proposed Plaintiffs are the same as those asserted by the original Plaintiffs. *Id.* at 9. Plaintiffs argue permissive joinder is appropriate as the proposed Plaintiffs' claims arise from the same series of transactions and occurrences engaged in by Defendants and the new Plaintiffs raise questions of law and fact common to all existing Plaintiffs and Defendants. *Id.* at 10-17.

Defendants argue the Plaintiffs' claims should not be joined; thus, joining additional Plaintiffs is futile and prejudicial. ECF No. 58 at 4-6. Defendants reiterate their argument that the claims do not arise from the same transaction or occurrence and that adding more parties will only

¹ The Court applies the five factor test applicable to a motion for leave to amend. This test requires the Court to consider "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). Defendants' argument against adding new allegations only addresses the futility factor. ECF No. 58 at 7-8

² Plaintiffs also seek to correct the proper name of Plaintiff D.P. to D.P.U. ECF No. 53 at 3. Defendants do not oppose this correction, but submit this can be done by simply updating the case caption. ECF No. 58 at 1, n. 1.

1 increase costs, create confusion, and result in prejudice. *Id.* at 6-7. Defendants argue the new
 2 allegations regarding “interconnected activities” are implausible and irrelevant. *Id.* at 7-8.
 3 Defendants also argue the new allegations apply only to the issue of joinder, not the parties’ claims.
 4 *Id.* at 8.

5 In reply, Plaintiffs submit Defendants’ arguments are conclusory and unsupported by case
 6 law. ECF No. 60 at 4-5. Plaintiffs return to the argument of consolidated discovery reiterating the
 7 conclusion that their claims arise from the same series of occurrences and transactions and present
 8 numerous common questions of law and fact. *Id.* at 6-10. Plaintiffs once again argue maintaining
 9 this matter as one case is efficient because the new allegations are interconnected with the existing
 10 claims. *Id.* at 10-14.

11 There is no dispute that Plaintiffs diligently sought to amend their Complaint. With respect
 12 to adding Plaintiffs, Defendants repeat their arguments and contend adding a new defendant, sued
 13 by only one new plaintiff, fails to meet the test for consolidating Plaintiffs’ claims. ECF No. 58 at
 14 4-6. However, there is no genuine dispute that the new proposed plaintiffs assert the same claims as
 15 the original Plaintiffs. *Compare* ECF No. 53-1 at 34-44 *and* ECF No. 1 at 34-47. As discussed
 16 above, severing the existing claims is denied to the extent the Court requires the parties to conduct
 17 appropriate joint discovery and engage in appropriate joint motion practice. This reasoning applies
 18 equally here.³

19 Defendants seek to prevent Plaintiffs’ amendment arguing implausibility; however, “even in
 20 the face of factual allegations that appear unlikely, ‘so long as the plaintiff alleges facts to support a
 21 theory that is not facially implausible, the court’s skepticism is best reserved for later stages of the
 22 proceedings when the plaintiff’s case can be rejected on evidentiary grounds.’” *Dollar Tree Stores*
 23 *Inc. v. Toyama Partners, LLC*, Case No. C 10-00325 SI, 2010 WL 1688583, at *2 (N.D. Cal. Apr.
 24 26, 2010) (quoting *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008). “[A] well-
 25 pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is

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 27 ³ Plaintiffs should note that they fail to include the two new Defendants in their definition of “Defendants” and
 28 “Defendant Baby Food Manufacturers.” ECF No. 53-1 at 2. It is clear from the content of Plaintiff’s Motion and
 proposed amended Complaint that this was an error. Plaintiffs are granted leave to correct this error. *Olympic Food*
Prod., Inc. v. P&J Brands, Inc., Case No. CV-06-902-PHX-JAT, 2007 WL 174093, at *1 (D. Ariz. Jan. 18, 2007).

1 improbable, and that a recovery is very remote and unlikely.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
 2 544, 556 (2007) (internal quotation marks omitted). Plaintiffs seek to add factual allegations that
 3 Defendants relied on shared third-party individual ingredient suppliers, third-party brokers, third-
 4 party co-manufacturers, and third-party testing labs; conspired to establish a baseline for product
 5 specifications for toxic heavy metals; formed and/or joined the Baby Food Council to address the
 6 issue of heavy metal exposure; and Gerber and Nurture shared testing results with Beech-Nut in
 7 2016. ECF No. 53-1 at 19-21. Even if “unlikely” or “improbable,” it is plausible that industry
 8 competitors would engage in these types of interconnected activities. Thus, the Court finds that
 9 adding allegations of Defendants’ interconnected activities are not futile based on implausibility.

10 Defendants also argue the new allegations are irrelevant and immaterial to Plaintiffs’ claims,
 11 and therefore are subject to a motion to strike. ECF No. 58 at 7-8. A “[m]atter is immaterial [for
 12 the purposes of a Rule 12(f) motion to strike] if it has no bearing on the controversy before the
 13 court.” *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1201 (D. Nev. 2009) (internal quotations omitted).
 14 Moreover, if the “proposed amendment adds allegations elaborating the existing theories in the
 15 Complaint, amendment would not be futile.” *United States ex rel. Miller v. ManPow, LLC*, Case
 16 No. 2:21-CV-05418-VAP-ADSx, 2023 WL 2661182, at *4 (C.D. Cal. Feb. 28, 2023). Plaintiffs
 17 bring a deceptive trade practices claim, which relies on the allegation that Plaintiffs knowingly made
 18 false representations to Nevada consumers regarding the safety of their products. ECF No. 53-1 at
 19 40-42. Defendants’ alleged participation in interconnected business activities would “elaborate[e]
 20 the existing theor[y]” that each Defendant knew its products were dangerous by demonstrating a
 21 possible shared knowledge between them. Thus, these allegations have at least some “bearing on
 22 the controversy before the court.” The Court finds these new allegations are not futile based on
 23 irrelevance or immateriality.

24 **III. Order**

25 Accordingly, IT IS HEREBY ORDERED that Defendants’ Joint Motion to Sever (ECF No.
 26 41) is DENIED without prejudice. Whether these cases should be severed for purposes of certain
 27 motion practice or for trial may be raised by Defendants in the future.

1 IT IS FURTHER ORDERED that the parties must meet and confer no later than **November**
 2 **6, 2023**, to commence discussions on the scope of joint discovery and joint dispositive motion
 3 practice. The parties must continue discussion so that **no later than November 20, 2023**, they file
 4 a Discovery Plan and Scheduling Order reflecting agreed upon consolidated discovery, agreed upon
 5 individualized discovery, identification of discovery on which they do not agree, and a proposed
 6 scheduling order. Each party may **succinctly** present individual positions as appropriate. The parties
 7 are to identify multiple dates and times on which they are all available for a case conference at which
 8 the proposals and positions will be addressed by the Court.

9 IT IS FURTHER ORDERED that Plaintiffs' Motion to Amend (ECF No. 53) is GRANTED
 10 for purposes of conducting consolidated discovery and motion practice consistent with the terms of
 11 this Order.

12 IT IS FURTHER ORDERED that the caption of this case is amended to correct Plaintiff
 13 D.P.'s name to D.P.U.

14 IT IS FURTHER ORDERED that Plaintiffs have **five (5) court days**, measured from the
 15 date of this Order, to file their First Amended Complaint with the corrected caption and to define
 16 "Defendants" to include all Defendants named in the First Amended Complaint.

17 IT IS FURTHER ORDERED that Defendants has **twenty-one (21)** days from the date the
 18 First Amended Complaint is filed to file a responsive pleading.

19 Dated this 24th day of October, 2023.

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 22 ELAYNA J. YOUCHAK
 23 UNITED STATES MAGISTRATE JUDGE
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